



**Comptroller General
of the United States**
Washington, D.C. 20548

J. Isrin

Matter of: Weather Data Services, Inc.
File: B-241621
Date: February 19, 1991

Sam Zalman Gdanski, Esq., for the protester.
Timothy P. Breiding for Midwest Weather, Inc., an interested party.
James K. White, Esq., Department of Commerce, for the agency.
Jeanne Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly permitted upward correction of alleged mistake in firm's low bid, and protest on that ground is sustained, where the firm has submitted no worksheets or other contemporaneous evidence in support of its explanation that the bid was based upon the firm's use of wrong Department of Labor wage determination for part of the bid.

DECISION

Weather Data Services, Inc. protests the decision to allow Midwest Weather, Inc. to correct its bid under invitation for bids (IFB) No. 51-WCNW-1-06002BLM, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for weather observation services at four locations in Iowa and one in Omaha, Nebraska.

We sustain the protest.

The IFB identified services for the five locations as separate line items and requested prices for a base period and two option periods. It also specified the applicable Department of Labor wage determinations for each of the five locations and provided a copy of each wage determination as an attachment. Bids were to be evaluated based on the total price for the five locations. Prior to bid opening, the NOAA contracting specialist received a telephone call from Midwest Weather, Inc., claiming that it inadvertently had used the wage determination for Ottumwa, Iowa in computing its bid for Cedar Rapids, Iowa. As the two wage determinations differed in their rates for fringe benefit compensation (\$0.59 for Ottumwa and \$1.84 for Cedar Rapids), Midwest asked to

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increase its bid, which it already had submitted, to reflect the difference. The contracting specialist told Midwest to forward the correction by facsimile transmission (fax). Subsequently, the contracting specialist received, but disregarded, the fax (apparently in the amount of \$35,523, although we have not been furnished a copy of the fax) because modifications by fax were not authorized in the IFB.

Upon bid opening, the low bidder was Midwest at \$1,375,580. Eastern Weather Observers was second low at \$1,400,584, and the protester was third low at \$1,443,244. The contracting officer informed Midwest that it was the apparent low bidder based on its original bid, but that its fax could not be accepted to alter it. Midwest thereupon requested authorization to correct its bid and subsequently submitted a written request to increase it from \$1,375,580 to \$1,411,103 (i.e., by \$35,523) with a supporting affidavit and worksheets. After examining Midwest's submissions, the contracting officer concluded that, because the wage determinations were similar and were issued for cities within the same county,^{1/} it would be easy to confuse them, lending credence to Midwest's claim as to how the mistake occurred. She also noted that if the hourly fringe benefit rate of \$1.84, instead of \$0.59 had been used in the computation for Cedar Rapids, the bid for Cedar Rapids would have been increased by \$35,523, the figure cited by Midwest.

The matter then was referred to the head of the contracting activity (HCA), who concluded that the evidence was clear and convincing as to the existence of a mistake and the bid actually intended. As allowing Midwest to correct its bid did not displace a lower bidder, the HCA authorized correction pursuant to Federal Acquisition Regulation (FAR) § 14.406-3(a). As a result, Midwest's bid was increased to \$1,411,103, which, for the time being, was the second-low bid after Eastern Weather's (\$1,400,584). The contracting officer subsequently determined that Eastern Weather was not a responsible prospective contractor, and referred the determination to the Small Business Administration (SBA) for a final determination. SBA declined to issue a certificate of competency, leaving Midwest the apparent low bidder. On October 12, Weather Data filed this protest with our Office. Award has been delayed pending resolution of the protest.

As a preliminary matter, the Army argues that Weather Data is not an interested party to bring the protest in that, because

^{1/} The agency asserts that ordinarily the same wage determination applies to all areas within a county, whereas in this case the base wage rates for Ottumwa and Cedar Rapids were the same, but the fringe benefit rates were different.

Midwest is the low bidder with or without the upward bid modification, Weather Data would not be in line for award even if its protest were sustained. Hence, the Army concludes, the firm lacks the direct economic interest required to bring a protest under our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990). We disagree. Weather Data is an interested party because, if it prevails and correction is disallowed, there is a possibility that Midwest's bid will be withdrawn, either at its own request or by the direction of the agency, in which case Weather Data would be in line for award. This possibility provides the requisite interest to a second-low bidder challenging correction of the low bid. See Tektronix, Inc., B-219981, Nov. 27, 1985, 85-2 CPD ¶ 611.

Turning to the merits, an agency may permit upward correction of a low bid where clear and convincing evidence establishes both the existence of a mistake and the bid actually intended. FAR § 14.406-3(a); American Dredging Co., Inc., B-229991.2, Sept. 15, 1988, 88-2 CPD ¶ 248.

We find that the upward correction here was improper because there is no clear and convincing evidence that Midwest's bid as submitted did not accurately reflect Midwest's intent at the time the bid was submitted. Although Midwest's explanation that it relied on an incorrect wage determination in arriving at its bid total certainly is plausible, Midwest has furnished no worksheets or any other contemporaneous documentation showing how the mistake was made, or otherwise indicating that Midwest actually intended to fully include the fringe benefit portion of the wage determination in its bid for work at Cedar Rapids.

While Midwest's attempt to change its bid prior to bid opening may lend credence to its explanation that it used the wrong wage determination, this attempt also did not evidence the firm's intent at the time of bid submission. Rather, Midwest's faxed price change constituted an unsuccessful attempted bid modification that evidences the firm's intent only at the time of the fax. (We note, furthermore, that neither the agency nor Midwest has furnished a copy of the fax for the record.)

We conclude that Commerce improperly permitted upward correction of Midwest's bid. In contrast to the clear and convincing evidence required for bid correction, withdrawal of a bid requires a lesser degree of proof. McGeary Co., B-230713, June 20, 1988, 88-1 CPD ¶ 586. Thus, our decision here that there is insufficient evidence to permit correction does not preclude a determination that Midwest should be permitted to withdraw its bid under FAR § 14.4063(c). Accordingly, by letter of today to the Secretary of Commerce,

we are recommending that Midwest either be awarded a contract at its original bid price, or be permitted to withdraw its bid, as the contracting officer determines is appropriate. Should Midwest be permitted to withdraw, a contract should be awarded to Weather Data, if otherwise appropriate. In either case, Weather Data is entitled to reimbursement of its protest costs. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

Milton F. Aoulan
for Comptroller General
of the United States